Supreme Court, U. S.
FILED
JUN 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1842

RUTH A. HAGAN, MARILYN B. DOW,
MARY LOU PATTISON

AND

JOHN CURTIS, M.D.,
Petitioners

v.

GEORGIA MAE DOWNS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 30, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is not yet officially reported. That opinion is reprinted in the Appendix to Petition, pages 13-41.

The bench ruling of the United States District Court for the District of Maine granting Petitioners' motions for a directed verdict is reprinted in the Appendix to Petition, pages 3-12.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1978. (Cert. App. 42) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the social worker Petitioners are entitled to assert qualified immunity from money damages under 42 U.S.C. § 1983 for actions taken in fulfillment of their official responsibilities.

2. Whether the unsettled state of the law defining a guardian's authority relative to the personal rights of his ward entitles the social worker Petitioners and Petitioner Curtis, if he is deemed to be a state actor, to qualified immunity as a matter of law.

3. Whether Petitioner Curtis, whose only challenged actions were taken while acting as the Respondent's private physician, can be characterized as a state actor by virtue of the position he held as Chief of Staff of the Milo Community Hospital which was characterized as a state actor by the court below.

STATUTES INVOLVED

The resolution of this case will not necessarily require the Court to construe the provisions of any particular constitutional provision or statute. Statutes which are referred to in the text of this Petition include Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1975), *as amended,* Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1977); Me. Rev. Stat. Ann. tit. 18, §§ 3505, 3605; and 42 U.S.C. § 1983, all of which are reprinted in the Appendix to Petition, pages 43-44.

STATEMENT OF THE CASE

Respondent commenced this action in the United States District Court for the District of Maine under 42 U.S.C. § 1983 in March 1975.[1] Jurisdiction in the district court was predicated on 28 U.S.C. § 1343. The gravamen of her complaint was that the Petitioners in conspiracy or acting in concert with the other defendants deprived her of certain constitutional rights by preventing her from marrying the person of her choice at the time of her choice, removing her child from her custody, and arranging for and performing a medical operation of sterilization upon her, all without her consent. The Petitioners, Hagan, Dow and Pattison, hereinafter referred to as the "social workers", were, at all times relevant, employees of the State of Maine Department of Health and Welfare. Petitioner Hagan was employed as a substitute care manager having supervisory authority over Petitioner Pattison, a social worker. Petitioner Dow was employed as a child and family service worker. Petitioner Curtis was, at all times relevant, Respondent's private physician with a private practice in Milo, Maine and was also the Chief of Staff of defendant Milo Community Hospital. The other named defendants were Davis Goodine, the Respondent's father; Roberta Sawtelle, the Respondent's sister and guardian; Carl Carlson, the town manager of the Town of Milo, who authorized payment for the sterilization operation out of town welfare funds; the Milo Community Hospital, where the sterilization operation was performed; and, Ava Strout, the administrator of the Milo Community Hospital.

Respondent is a deaf woman with borderline or dull normal intelligence who had received social services as a client of the Maine Department of Health and Welfare during the

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[1] Respondent also asserted a claim under 42 U.S.C. § 1985(3) upon which all defendants were granted summary judgment which was affirmed by the court of appeals.

course of her first pregnancy in 1971. Many of those services, including assistance with prenatal care and planning for her expected child, were provided by Petitioner Dow who had an opportunity to meet with Respondent on numerous occasions and communicate with her via written notes or through Roberta Sawtelle who was able to communicate with Respondent in sign language. Without the involvement of Petitioner Dow or the Department of Health and Welfare Respondent's child, shortly after his birth, was placed in the home of Davis Goodine where he continues to reside.

GUARDIANSHIP AND STERILIZATION

Subsequently, efforts were made by Petitioner Curtis, with some assistance from Petitioner Dow, Roberta Sawtelle and a state public health nurse, to assist Respondent with birth control methods including the use of birth control pills and later an I.U.D., both of which proved to be unsatisfactory. When Respondent became pregnant again in 1972, Davis Goodine contacted the Department of Health and Welfare and requested assistance with medical expenses, a sterilization and possible adoption of the expected child because Respondent had told him that she did not want any more children. Shortly after his request was made, Petitioner Dow met with him to discuss his request. Dow recommended that guardianship might provide a possibility for him to gain some control over his daughter, the Respondent; but she advised him that she did not know whether as guardian he could consent to a sterilization of the Respondent and advised him to consult an attorney. Subsequently, Davis Goodine filed a petition for guardianship of the Respondent in the Maine Probate Court. Shortly after Davis Goodine filed his petition seeking guardianship of the Respondent she voluntarily moved into the home of Roberta Sawtelle where she was housed, fed and generally

looked after while all the events relevant to this action took place and where she continued to reside until her marriage to Carroll Downs.

The probate court requested Petitioner Dow to prepare a report regarding guardianship of the Respondent. In preparing the report Dow discussed guardianship with the Respondent through Roberta Sawtelle acting as interpreter and reviewed materials regarding the Respondent which were in the files of the Department of Health and Welfare. Dow filed with the probate court her report recommending that Roberta Sawtelle be appointed guardian. After a hearing at which Petitioner Dow, Davis Goodine's attorney, Roberta Sawtelle, Respondent and an attorney representing Respondent and Roberta Sawtelle were present, the probate court appointed Roberta Sawtelle guardian of the Respondent. Respondent has not challenged the validity of that probate court order.

During the Respondent's second pregnancy Dr. Curtis met with her and Roberta Sawtelle and discussed sterilization. Dr. Curtis testified that he was convinced that the Respondent understood the operation and was in agreement with having it performed, although she testified at trial that she did not consent. At no time did any of the social workers request that Dr. Curtis perform the sterilization or request that Roberta Sawtelle, as guardian, execute a consent to the sterilization. Instead they followed their usual procedure in a case like this and suggested that the family discuss the matter with Respondent's physician, Dr. Curtis. There is no evidence to indicate that the social workers were aware or advised by either Dr. Curtis or Roberta Sawtelle that the Respondent had indicated any opposition to the sterilization. Prior to the sterilization Dr. Curtis contacted Petitioner Dow in order to determine what steps he might have to take in order to accomplish the steriliza-

tion within the law. Petitioner Dow advised him that that information would best be learned from the probate court judge and she advised Dr. Curtis to contact him.

Shortly after the Respondent gave birth to her second child the sterilization operation was performed on the strength of a written consent signed by Roberta Sawtelle as guardian and on what Dr. Curtis perceived and believed to be the Respondent's consent.

CUSTODY OF RESPONDENT'S CHILD

Prior to the birth of the Respondent's second child, Petitioners Dow and Pattison had discussions with Roberta Sawtelle regarding the unborn child and were advised that the Respondent did not want the child. Since there appeared to be a possibility that the child would be placed for adoption, the question arose as to whether or not the guardian was the appropriate person to consent to a surrender and release for the purpose of permanently terminating the Respondent's rights to the child, thereby freeing it for adoption. The Maine Attorney General advised the social workers that the guardian could not consent to such a surrender and release and recommended that a judicial commitment procedure be utilized in order to free the expected child for adoption. Nine days after the birth of the Respondent's child Petitioner Pattison filed a petition for its judicial commitment. Prior to the filing of that petition the child was placed in a foster home on the strength of an agreement executed by Roberta Sawtelle as guardian of the Respondent in accordance with Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1975), *as amended*, Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1977). (Cert. App. 44) Pending hearing on the commitment petition the Respondent did not express any concern or objection that her child had been temporarily placed in a foster home. At the commitment hearing

before the Maine District Court, she indicated that she had no objection to the child being placed in state custody. (Cert. App. 1)

RESPONDENT'S MARRIAGE PLANS

During the second pregnancy Petitioners Dow and Pattison became aware that the Respondent had some interest in getting married. Neither Dow nor Pattison wished to see the Respondent marry at that time because they believed that the intended husband, Carroll Downs, might have become the legal, although it is admitted that he is not the natural, father of the child. They believed that this might have unnecessarily delayed the judicial commitment proceeding which at that time was proceeding on the basis that the child was illegitimate. Their concerns were based in part on a statement made by Mr. Downs prior to the child's birth clearly indicating that he did not wish to have custody of the child. Although admitting that he made the statement, he testified that it was made in jest.

Petitioners Dow and Pattison expressed their views regarding the marriage to Roberta Sawtelle; however, neither the Respondent nor her intended husband, Carroll Downs, testified that Roberta Sawtelle refused to consent to the marriage but rather that she had asked them to postpone their marriage until after the child was born. The Respondent and Mr. Downs agreed to wait because they felt that they should obey the Respondent's sister, Roberta Sawtelle. Shortly after the birth of the child, the Respondent and Carroll Downs were married.

PROCEEDINGS BELOW

Prior to trial the Petitioners as well as the other defendants moved for summary judgment which the district court granted to defendants Carlson, Strout and Milo Com-

munity Hospital. During a jury trial before the district court and at the close of Plaintiff's case the court granted motions for directed verdicts on behalf of the Petitioners and the remaining defendants. (Cert. App. 3) On March 29, 1977 the district court entered judgment for the Petitioners and defendants Sawtelle and Goodine which was amended on April 26, 1977 to include all of the named defendants.

On April 28, 1977 the Respondent filed a Notice of Appeal to the First Circuit Court of Appeals seeking reversal of the summary judgments and directed verdicts granted by the district court. The court of appeals affirmed the summary judgments for Ava Strout and Carl Carlson; affirmed the directed verdict granted to Davis Goodine; and, affirmed the directed verdict granted to Petitioner Curtis on that part of Respondent's claim involving interference with her right to marry and custody of her child. The court of appeals reversed the summary judgment granted to Milo Community Hospital; reversed the directed verdict granted to the social workers and Roberta Sawtelle; and, reversed the directed verdict granted to Petitioner Curtis on that part of Respondent's claim dealing with the sterilization.

Petitioners now seek a writ of certiorari to review the decision of the court of appeals with respect to three issues: whether qualified immunity as outlined in *Wood* v. *Strickland*, 420 U.S. 308, 322, (1975), applies to the social workers; whether, in appiying the *Wood* test, the social workers and Dr. Curtis, to the extent that he is deemed to be a state actor, are entitled to qualified immunity as a matter of law; and, whether Dr. Curtis is a state actor by virtue of his position as Chief of Staff of Milo Community Hospital.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Opinion Below Conflicts with Decisions of this Court Regarding the Availability of Qualified Immunity to Public Officials Sued Under 42 U.S.C. § 1983.

The court of appeals, with Chief Judge Coffin dissenting, held that the district court erroneously assumed that the social workers were entitled to rely upon the qualified immunity available to other public officials under the test articulated in *Wood* v. *Strickland*, 420 U.S. 308 (1975). The majority relied on this Court's decisions in *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Wood*, *supra*, for its holding that qualified immunity measured by the test outlined in *Wood* is only available to "certain" public officials who meet the requirements of a two-fold inquiry. (Cert. App. 34-36) The court of appeals defined this inquiry as first requiring the district court to review the common law in order to determine whether or not the social workers fell within a class of public officials traditionally afforded immunity in actions similar to the cause of action asserted by the Respondent under 42 U.S.C. § 1983 and second requiring the district court to review the nature and range of responsibility of the social workers' positions in order to determine whether qualified immunity could be made available as a matter of public policy ". . . to avoid discouraging effective official action by public officers charged with a considerable range of responsibility and discretion." *Wood*, *supra*, at 317-18.

Although *Wood* provided qualified immunity in the specific context of school discipline, the court of appeals recognized that this Court has applied the *Wood* test to public

officials other than school board members in *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975), and recently in *Procunier* v. *Navarette,* — U.S. —, 55 L.Ed2d 24 (1978), without engaging in the inquiry which the court of appeals believes is necessary in this action.

While the court of appeals recognized that this Court in *Procunier* without engaging in the so-called inquiry it wishes the district court to make allowed certain prison officials to assert the qualified immunity outlined in *Wood,* it rationalized this Court's application of the *Wood* test on the basis that a substantial body of law as to the right of prison officials to assert qualified immunity was already established thereby making the inquiry unnecessary. (Cert. App. 36-37) The court of appeals failed to point out that the defendants in *Procunier* included not only those prison officials with a wide range of discretion such as the warden and the director of the state department of corrections but also a member of the prison staff in charge of handling incoming and outgoing mail whose function arguably might not meet the second part of this "inquiry" allowing qualifield immunity on the basis of public policy where the official's actions involve a considerable range of responsibility and discretion. If qualified immunity, on the basis of public policy, is available to a prison mail clerk it is hard to conceive that it would be unavailable to social workers whose functions, as the substantial record in this case reveals, involved a great deal of discretion in providing a complex range of social services authorized by their employer, the Maine Department of Health and Welfare.

The majority recognized that numerous other courts of appeals " . . . have displayed little hesitancy in extending the qualified immunity to a variety of officials . . ." (Cert. App. 29-30) Chief Judge Coffin pointed out that in view of these numerous other public officials who have been

granted qualified immunity based upon *Wood* "[t]here seems little basis for distinguishing them [the social workers] in terms of public policy rationale . . ." (Cert. App. 40). Nevertheless the majority concluded that a remand was necessary to determine this "crucial" question. (Cert. App. 36)

Notably, Justice Stevens dissenting in *Procunier* stated that the Court's decision strongly implies that qualified immunity is available to all public officials. He agreed with this proposition stating that "[a] public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." — U.S. —, 55 L.Ed.2d, at 35.

When this action was commenced the First Circuit applied a purely subjective test in determining the liability of public officials for money damages under 42 U.S.C. § 1983. That subjective test was outlined in *Gaffney* v. *Silk,* 488 F.2d 1248, 1250 (1st Cir. 1973), in which the defendants were town selectmen. The court stated, ". . . as to these officials, where independent judgment and discretion are involved, the courts have permitted only a qualified immunity based upon good faith performance of their duties as they saw them." In *Scheur,* this Court applied a similar subjective test in determining the availability of qualified immunity to executive officers. *Wood,* however, in the specific context of schoool discipline, added an objective factor to the subjective test applied in *Scheuer.* The dissenters in *Wood* pointed out that this objective factor ". . . appears to impose a higher standard of care upon public school officials, sued under § 1983, than that heretofore required of any other official." 420 U.S. at 327.

The social workers did not argue in either the district court or the court of appeals that the less stringent subjective tests of *Scheuer* or *Gaffney* applied to them but were

confident in allowing their actions to be carefully scrutinized in accordance with the stricter *Wood* test. The court of appeals opinion in this action indicates that their reliance may have been misplaced and has created a result which qualified immunity was designed, in part, to prevent. It has created the apprehension that the social workers' official actions even though taken in good faith fulfillment of their responsibilities may be punished and that therefore their discretion, unlike that of public school officials, should be exercised only with undue timidity, a result contrary to public policy and the opinions of this Court regarding qualified immunity. It is respectfully submitted that the opinion below should be reviewed because it conflicts with the decisions of this Court regarding qualified immunity.

B. The Social Workers and Petitioner Curtis, to the Extent that He is Deemed to be a State Actor, are Entitled to Qualified Immunity as a Matter of Law, Since the Law Regarding the Authority of Guardians Relative to the Personal Rights of Their Wards is Unsettled.

A review of the Petitioners' actions, if conducted in accordance with the *Wood* test, reveals that they are entitled to immunity as a matter of law thereby making a remand unnecessary. Since *Wood* clearly requires that the Petitioners either knew or should have known that the actions they took would result in the deprivations asserted by the Respondent before liability could attach, the availability of immunity can be decided as a matter of law by reviewing the state of the law at the time their actions took place.[2]

[2] No attempt is made here to analyze that part of the *Wood* test that would eliminate the availability of qualified immunity to the social workers if they acted with a " . . . malicious intention to cause a deprivation of constitutional rights or other injury to the [Respondent] . . . " 420 U.S., at 322, since the court below never reached that issue. While the majority, in a footnote (Cert. App. 36), indicated that the claims against the social workers should be resolved by the jury, the district court, having had the benefit of reviewing extensive discovery materials at the time it considered motions for summary judgment as well as having heard the Respondent's entire case at trial, concluded that there was no evidence showing " . . . bad faith, knowing misconduct or unreasonable action" by the social workers. (Cert. App. 8)

Although the opinion below addresses Petitioner Curtis' actions under this part of the *Wood* test, it is clear that the court's analysis (Cert. App. 30) does not disclose any inference of malicious intention in performing the sterilization. If, in fact, there was a failure to obtain whatever may be required as an informed consent under the circumstances of this case that is a matter which, as Reason C of this Petition indicates, might amount to negligence which is not actionable under 42 U.S.C. § 1983.

It is submitted that a review of the record by this Court will fail to disclose any inference of malice attributable to any of the Petitioners.

In determining whether they "should have known" they cannot be ". . . charged with predicting the future course of constitutional law," *Pierson, supra* at 557, however their actions cannot be justified by ". . . ignorance or disregard of settled, indisputable law. . ." *Wood, supra* at 322.

Recent decisions of this Court as well as other federal courts make it clear that the issues raised in this action lend themselves to no simple solution and remain unsettled to this day. Issues involving the relative rights of a guardian regarding control over the personal rights of his ward have posed great difficulty to the courts which have had to address them. The difficulties faced by the district court in *Relf* v. *Weinberger,* 372 F.Supp. 1196 (D.C.D.C. 1974) and *Relf* v. *Mathews,* 403 F.Supp. 1235 (D.C.D.C. 1975), demonstrate that the law in this area is not settled. The cases involved proposed HEW regulations which allowed the use of federal funds for the sterilization of mental incompetents at the request of the incompetent person's representative. Although the district court rejected the proposed regulations on several grounds, it did not discount the likelihood that a guardian or representative of an in-

competent might be able to consent to a sterilization operation. 403 F.Supp. at 1238. Indeed the court of appeals in this action indicated that ". . . it might be that a spendthrift guardian . . . has authority to consent." (Cert. App. 32) While there are cases dealing with the common law rights of parents to consent to the sterilization of their children, *A.L.* v. *G.R.H.*, 325 N.E. 2d 501 (Ind. 1975), and cases dealing with the jurisdiction of courts to order involuntary sterilizations, *Stump* v. *Sparkman*, __ U.S. __, 55 L. Ed. 2d 331 (1978), there are none dealing with the specific question which arose in this action, that is, did Roberta Sawtelle as guardian have the authority to consent to the sterilization of the Respondent. The record in this action clearly indicates that the social workers did not know whether the guardian could consent and merely advised all who asked the question to consult with an attorney and in one instance to consult with the probate judge who ordered the guardianship. Dr. Curtis assumed that the guardian was the appropriate person to execute the consent and believed that the Respondent had also consented.

Although the specific statutory section under which the Respondent was placed under guardianship indicated that she was a spendthrift, Maine law does not differentiate between the rights of guardians of spendthrifts and the rights of guardians of other incompetents. It provides that all guardians shall have the custody of the persons of their wards. Me. Rev. Stat. Ann. tit. 18, § 3605. (Cert. App. 43) A guardian has the authority to ". . . appear for and represent his ward in all legal proceedings unless another is appointed for that purpose as guardian or next friend." Me. Rev. Stat. Ann. tit. 18, § 3505. (Cert. App. 43) As guardian of both the person and the estate it would appear that Roberta Sawtelle had the authority to represent the Respondent in matters not only regarding her estate but her person. The parameters of this authority are not

clearly established in either Maine or constitutional law. By way of analogy, in the context of the commitment of minors to mental institutions, the court in *Bartley* v. *Kremens*, 402 F.Supp. 1039 (E.D. Pa. 1975), in attempting to decide whether or not parents, guardians or persons standing in *loco parentis* may effectively waive the personal rights of children, found that the question was both difficult and unique. In vacating and remanding that case to the district court this Court has yet to offer guidance on that difficult issue. *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

The social workers' minimal discussions with the Respondent, her guardian and Davis Goodine concerning sterilization, marriage plans, and custody of her child, and Dr. Curtis' discussions with the Respondent and her guardian regarding sterilization, are discussions which this Court, as demonstrated in *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), would encourage as long as the ultimate decision of the guardian does not act as a veto on the Respondent's exercise of her fundamental rights. The Respondent's own testimony in this case indicates that the only person she informed of her opposition to the sterilization was Petitioner Curtis (which raises an informed consent issue more appropriately addressed in the pending state court action which the Respondent has commenced against Dr. Curtis); that her guardian merely asked her to wait to get married and that she waited because she felt she should obey her sister; and, that although she now complains that she did not want her child to be placed in state custody, she never communicated that to the social workers. There is no evidence that the social workers were aware that the Respondent was in disagreement with any of the decisions she now claims were made against her will.

The actions of the Petitioners can hardly be characterized as actions taken in disregard of the settled and indisputable

constitutional rights of the Respondent and therefore they should be entitled, as a matter of law, to the protection afforded by a qualified immunity from money damages in this action. It is respectfully submitted that the opinion below should be reviewed because the court failed to consider that part of the *Wood* test which, if applied, would entitle the Petitioners to qualified immunity as a matter of law.

C. The Opinion Below Which Characterized Petitioner Curtis as a State Actor by Virtue of His Position as Chief of Staff of the Milo Community Hospital was Made Without Regard to and Contrary to This Court's Opinions in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

In finding Petitioner Curtis to be a state actor, the court of appeals engaged in a two-part inquiry through which it concluded that Milo Community Hospital was a state actor and that by virtue of his position as its Chief of Staff he was also a state actor. The court first found ". . . that the state has so insinuated itself into a position of interdependence with [Milo Community Hospital] that it must be recognized as a joint participant in the challenged activity, which, on that account cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." (Cert. App. 20) In the second part of its inquiry, the court examined the by-laws of Milo Community Hospital which provide that "[r]esponsibility for operation and maintenance of the Hospital and evaluation of Hospital practices shall be a *joint effort* by the Board of Trustees, Administrator and the Chief of Staff, *each to be a check on the other.*" (Cert. App. 26) The by-laws further charged the Chief of Staff with the responsibility ". . . for the functioning of the clinical organization of the Hospital and [required that he] shall keep or cause to be

kept careful supervision over the clinical work of the Hospital." (Cert. App. 26)

Solely on the basis of his association with the hospital and without describing whether his role as Chief of Staff had any relationship, causal or otherwise, with the Respondent's 42 U.S.C. § 1983 claim, the court labeled him a state actor. In reaching its conclusion, the court of appeals totally ignored the reasoning in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Burton, supra* at 722, this Court held that state involvement must rise to a level of significance before the action of an otherwise private actor can be characterized as state action. In *Jackson, supra*, a 42 U.S.C. § 1983 action brought against a private utility company, the Petitioners claimed that the private utility was subject to state action treatment on the basis of extensive state regulation and the monopoly status occupied by it within its market area. The Court's opinion analyzed each aspect of the state's involvement with the private utility in order to determine whether in each instance there ". . . was a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." 419 U.S. at 351. The record in this action clearly demonstrates that the decision to sterilize the Respondent was one made between Dr. Curtis and the Respondent and that it in no way involved Dr. Curtis' position as Chief of Staff of the hospital where the sterilization operation happened to be performed. Dr. Curtis' position as Chief of Staff in no way affected the sterilization decision thereby satisfying neither *Burton's* significant state involvement test nor *Jackson's* "nexus" test.[3]

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[3] Notably the court of appeals in finding the hospital to be a state actor could find no "nexus" between the state and the challenged activity and therefore relied primarily on the test articulated in *Burton* (Cert. App. 25).

This Court's decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961), is instructive in demonstrating the error in the court of appeals reasoning. *Monroe* would require that the alleged injury was made possible only because the wrongdoer misused power possessed by virtue of state law. *Id.* at 184. That power is totally lacking here.

The strongest inference that can be drawn from the evidence presented in this case is that Dr. Curtis' actions were negligent or amounted to malpractice. Negligence could arguably arise from Dr. Curtis' reliance on the consent of the guardian to perform the sterilization operation or from a failure to adequately supervise his own clinical work as the by-laws of the Milo Community Hospital might require. Neither negligence nor malpractice, however, are actionable under 42 U.S.C. § 1983. *Harper* v. *Cseer,* 544 F.2d 1121, 1124 (1st Cir. 1976) and *Paul* v. *Davis,* 429 U.S. 693, 698-9 (1976).

Assuming *arguendo* that Dr. Curtis is a state actor, he should not only be entitled to assert qualified immunity, which the court of appeals indicated applied to him (Cert. App. 30), but should also be granted immunity as a matter of law, since the law regarding the authority of a guardian to consent to a sterilization of his ward was and is far from clear as more specifically appears in Reason B of this Petition. It is respectfully submitted that the opinion below should be reviewed because of the court's failure to follow the decisions of this Court in either *Burton* or *Jackson,* in characterizing a purely private actor as a state actor for purposes of imposing liability under 42 U.S.C. § 1983.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1978